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No. 05-1276

In the Supreme Court of the United States

RAUL GALINDO-PENA AND ALFONSO ACOSTA-GRIMALDO, PETITIONERS

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

The Immigration and Nationality Act attaches a variety of immigration consequences to an alien's commission of an "aggravated felony," 8 U.S.C. 1101(a)(43) (2000 & Supp. III 2003). The Act includes within its definition of "aggravated felony" "any felony punishable under the Controlled Substances Act." 18 U.S.C. 924(c)(2) (as incorporated into 8 U.S.C. 1101(a)(43)(B)). That term applies to offense conduct "whether in violation of Federal or State law." 8 U.S.C. 1101(a) (43) (2000 & Supp. III 2003) (final paragraph). The questions presented are:

1. Whether the court of appeals had jurisdiction over the legal questions raised in the petitions for review notwithstanding the petitioners' convictions for aggravated felonies.

2. Whether a conviction for a controlled substance offense that is a felony under state law and would be independently punishable under the Controlled Substances Act constitutes an "aggravated felony."

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OPINIONS BELOW

The orders of the court of appeals dismissing the petitions for review of both petitioners (Pet. App. 1, 17-18) are unreported. The decisions of the Board of Immigration Appeals (Pet. App. 2-4, 20-21, 30-32) and the immigration judges (Pet. App. 5-11, 22-29) in each of petitioner's cases are unreported.

JURISDICTION

The court of appeals entered orders dismissing petitioners Galindo-Pena's and Acosta-Grimaldo's cases on January 12, 2006, and March 16, 2006, respectively. The petition for a writ of certiorari was filed on March 31, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien who commits an "aggravated felony," 8 U.S.C. 1101(a)(43) (2000 & Supp. III 2003), may be ordered removed from the United States, 8 U.S.C. 1227(a)(2)(A)(iii). The commission of an aggravated felony also limits the potential forms of relief from removal that are available to the alien, including, as relevant here, rendering the alien ineligible to apply for cancellation of removal, see 8 U.S.C. 1229b(a)(3) and (b)(1)(C).[1]

The INA defines an "aggravated felony" by reference to a lengthy list of criminal offenses, one of which is "illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18)." 8 U.S.C. 1101(a)(43)(B). The term "aggravated felony" applies to such offenses "whether in violation of Federal or State law." 8 U.S.C. 1101(a)(43) (2000 & Supp. III 2003) (final paragraph).[2]

Section 924(c) of Title 18, in turn, defines "drug trafficking crime" as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement

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[1] The Attorney General may, in his discretion, cancel the removal of an alien who (i) has been a lawfully admitted permanent resident for not less than five years, (ii) has resided in the United States after having been admitted in any status for a continuous period of seven years prior to commencement of the removal proceedings, and (iii) has not been convicted of any aggravated felony. 8 U.S.C. 1229b(a)(1)-(3).

[2] Under the INA, a single offense of possessing 30 grams (approximately one ounce) or less of marijuana does not provide a basis for removal. 8 U.S.C. 1227(a)(2)(B)(i).

Act (46 U.S.C. App. 1901 et seq.)." 18 U.S.C. 924(c)(2). Title 18 defines a "felony" as an offense for which "the maximum term of imprisonment authorized" exceeds one year. 18 U.S.C. 3559(a). The Controlled Substances Act, 21 U.S.C. 801 *et seq.*, defines "felony" generally as "any Federal or State offense classified by applicable Federal or State law as a felony." 21 U.S.C. 802(13). The Controlled Substances Act further defines a "felony drug offense" as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." Anabolic Steroid Control Act of 2004, Pub. L. No. 108-358, § 2(a)(2), 118 Stat. 1663 (to be codified at 21 U.S.C. 802(44)); see generally 21 U.S.C. 802(44).

2. a. Petitioner Galindo-Pena is a native and citizen of Mexico, who entered the United States as an immigrant in 1968. Pet. App. 5. In May 2002, Galindo-Pena pleaded guilty in Texas state court to possession of a controlled substance (cocaine). *Id.* at 2-3, 6; see Tex. Health & Safety Code Ann. § 481.115(a) (West 2003). He was sentenced to two years in state prison, Pet. App. 6, but the sentence was then suspended and he was placed on probation for five years, *id.* at 5-6.

The Immigration and Naturalization Service commenced removal proceedings against Galindo-Pena, charging him with being removable as an alien convicted of both a controlled substance offense, 8 U.S.C. 1227(a)(2)(B)(i), and an "aggravated felony," 8 U.S.C. 1227(a)(2)(A)(iii). Pet. App. 5-6.[3] An immigration judge

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[3] The Immigration and Naturalization Service's immigration-enforcement functions have since been transferred to United States

sustained both charges, holding that Galindo-Pena's felony drug possession offense was a "drug trafficking crime" and an "aggravated felony" within the meaning of 8 U.S.C. 1101(a)(43)(B). Pet. App. 5-11.

The Board of Immigration Appeals (Board) affirmed. Pet. App. 2-4. The Board held that Galindo-Pena's cocaine offense was an aggravated felony within the meaning of 8 U.S.C. 1101(a)(43)(B). See Pet. App. 3 (citing *United States* v. *Caicedo-Cuero*, 312 F.3d 697 (5th Cir. 2002), cert. denied, 538 U.S. 1021 (2003)). The Board also held that Galindo-Pena's conviction of an aggravated felony rendered him statutorily ineligible for the discretionary relief of cancellation of removal. *Id.* at 4.

b. Petitioner Acosta-Grimaldo is a native and citizen of Mexico, who entered the United States in 1989 as an immigrant. Pet. App. 23. In 1997, Acosta-Grimaldo pleaded guilty in Texas state court to the intentional and knowing possession of more than 50 but less than 2000 pounds of marijuana. *Id.* at 25-26; see Tex. Health & Safety Code Ann. § 481.121(a)(5) (West 2003). Under Texas law, that offense is a felony punishable by a minimum sentence of two years, but no more than twenty years, of imprisonment. Tex. Penal Code Ann. § 12.33(a) (West 2003); Tex. Health & Safety Code Ann. § 481.121(a)(5) (West 2003). Acosta-Grimaldo was sentenced to eight years of imprisonment. Gov't C.A. Mot. to Dismiss 2. The sentence was suspended, and he was placed on probation for eight years. See Pet. App. 26.

The Immigration and Naturalization Service subsequently commenced removal proceedings against Acosta-Grimaldo on the ground that he was convicted

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Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. III 2003).

of a controlled substance offense, see 8 U.S.C. 1227(a)(2)(B)(i). An immigration judge terminated the proceedings, Pet. App. 30, ruling that Acosta-Grimaldo's offense did not render him removable because he received a sentence that was rehabilitative in nature, Pet. 9. The Board reversed based on intervening precedent establishing that Acosta-Grimaldo's conviction constituted a controlled substance offense, Pet. App. 31, and remanded the case to the immigration judge to determine whether Acosta-Grimaldo was eligible for discretionary relief from removal, *ibid.*

The immigration judge denied Acosta-Grimaldo's application for cancellation of removal, holding that Acosta-Grimaldo's conviction for possession of a controlled substance was an aggravated felony under Fifth Circuit and Board precedent. Pet. App. 26 (citing *In re Salazar-Regino*, 23 I. & N. Dec. 223 (BIA 2002); *United States* v. *Hernandez-Avalos*, 251 F.3d 505 (5th Cir.), cert. denied, 534 U.S. 935 (2001); *United States* v. *Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997)).

The Board affirmed the immigration judge's holding that Acosta-Grimaldo was ineligible for relief from removal because he had been convicted of an aggravated felony. Pet. App. 20-21.[4]

3. Both petitioners appealed. The government moved to dismiss the petitions for lack of jurisdiction under 8 U.S.C. 1252(a)(2)(C), on the ground that both

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[4] The Board also found that Acosta-Grimaldo had pleaded guilty to the controlled substance offense in May 1997, which was after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. See Pet. App. 20-21. The Board held, as a result, that Acosta-Grimaldo did not qualify for relief under *INS* v. *St. Cyr*, 533 U.S. 289 (2001). See Pet. App. 21. Petitioner does not seek this Court's review of that question.

petitioners' state-law convictions were aggravated felonies within the meaning of 8 U.S.C. 1101(a)(43)(B), based on Fifth Circuit precedent.[5] The court of appeals summarily dismissed both cases for lack of jurisdiction. Pet. App. 1, 17-18.

DISCUSSION

1. This Court's review of the question "whether the Fifth Circuit had jurisdiction to review the issues of law and constitutional questions presented" by petitioners (Pet. 13) is not warranted. That jurisdictional question has been definitively resolved by Section 106(a)(1)(A)(iii) of the Real ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 310 (to be codified at 8 U.S.C. 1252(a)(2)(D)). That provision states that the limitation on judicial review in cases involving criminal aliens, 8 U.S.C. 1252(a)(2)(C), does not apply to "constitutional claims and questions of law." REAL ID Act § 106(a)(1)(A)(iii), 119 Stat. 310. Such legal questions and constitutional claims are now reviewed exclusively in the courts of appeals, and may not be reviewed in habeas corpus proceedings. *Ibid.* Thus, neither petitioner nor the government disputes that the court of appeals had jurisdiction to review petitioners' legal arguments that their drug possession offenses are not "aggravated felonies."

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[5] Section 1252(a)(2)(C), as amended by Section 106(a)(1)(A) of the Real ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 310, provides, in relevant part, that, "[n]otwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, * * * no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense" designated in, *inter alia*, 8 U.S.C. 1227(a)(2)(B), which governs controlled substance offenses.

2. Petitioners also seek review (Pet. i) of the court of appeals' determination that their state convictions for drug possession were "aggravated felon[ies]," under 8 U.S.C. 1101(a)(43)(B), which preclude them from obtaining the discretionary relief of cancellation of removal.

On April 3, 2006, this Court granted writs of certiorari in *Lopez* v. *Gonzales*, 126 S. Ct. 1651 (No. 05-547), and *Toledo-Flores* v. *United States*, 126 S. Ct. 1652 (No. 05-7664), to decide whether the commission of a controlled substance offense that is a felony under state law, but that is generally punishable under the Controlled Substances Act only as a misdemeanor, constitutes an "aggravated felony" within the meaning of 8 U.S.C. 1101(a)(43)(B). The *Lopez* case arises in the context of a removal proceeding under federal immigration law, and *Toledo-Flores* arises in the criminal sentencing context. Because the Court's decision in those consolidated cases will determine the proper interpretation of the same statutory provision (8 U.S.C. 1101(a)(43)(B)) at issue here, the Court should hold this petition pending the Court's decision in *Lopez* and *Toledo-Flores*.

We note, however, that there is substantial doubt that the criminal conduct in which petitioners engaged would have been punished as misdemeanors under federal law. Petitioner Acosta-Grimaldo pleaded guilty to having possessed 50 to 2000 pounds of marijuana. Because of the large amount of marijuana that Acosta-Grimaldo was convicted of possessing, it is highly likely that the offense conduct to which he pleaded guilty would have been charged as possession with intent to distribute—which is a felony under federal law, see 21

U.S.C. 841(a) and 21 U.S.C. 841(b)(1) (2000 & Supp. III 2003)—rather than misdemeanor simple possession.[6]

With respect to petitioner Galindo-Pena, the administrative record reveals that, prior to his 2002 felony conviction for possession of cocaine, Galindo-Pena was convicted in 1986 in Texas state court of marijuana possession.[7] Under the federal Controlled Substances Act, a drug possession offense is punishable by up to two years in prison if a person "commits such offense after * * * a prior conviction for any drug, narcotic, or chemical, offense chargeable under the law of any State, has become final." 21 U.S.C. 844(a). Thus, Galindo-Pena's 2002 possession offense would have been punishable as a felony under federal law. See 18 U.S.C. 3559(a) (classifying an offense with a two-year sentence as a felony).

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[6] See, *e.g.*, *United States* v. *Haskins*, 166 Fed. Appx. 76 (4th Cir. 2006) (per curiam) (charging possession with intent to distribute 310.6 grams—approximately 11 ounces—of marijuana); *United States* v. *Rangel*, 149 Fed. Appx. 254, 255 (5th Cir. 2005) (per curiam) (charging possession with intent to distribute 771 grams—approximately 1.75 pounds—of marijuana).

[7] Because petitioner's appeal was dismissed, no certified administrative record was filed with the court.

CONCLUSION

With respect to the first question presented, the petition for a writ of certiorari should be denied. With respect to the second question presented, the petition for a writ of certiorari should be held pending this Court's decision in *Lopez* v. *Gonzales*, No. 05-547, and *Toledo-Flores* v. *United States*, No. 05-7664, and then dispose of in accordance with the Court's decision in those consolidated cases.

Respectfully submitted.

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